

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

77-2003

To be argued by
Irving Anolik

United States Court of Appeals

For the Second Circuit.

JACK NATHAN,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK.

PETITIONER-APPELLANT'S BRIEF.

IRVING ANOLIK
Attorney for Petitioner-Appellant
225 Broadway
New York, N. Y. 10007
(212) 732-3050

THE REPORTERS COMPANY, INC., New York, N. Y. 10007-212 732-6975-1977

(1431)

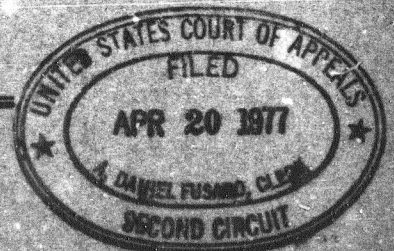


TABLE OF CONTENTS.

	Page
Historical Background	1
The Issue Presented	2
The Proceedings Below Considered	3
Point I. Petitioner's trial counsel, Louis Bender, was involved in a conflict of interest between Nathan and Nathan's former accountant, Katzman, both of whom he represented. Under the circumstances, Bender should have disqualified himself from representing petitioner at his trial	21
A. The fact of this conflict was not divulged to Nathan until the very eve of trial, and not to the Court until the first day of trial	21
Point II. There was no effective waiver of the conflict of interest by petitioner. Cer- tainly Richard Baltimore did not advise or participate in the determination to waive any conflict of interest	27
Point III. The Court below should have granted the motion to vacate the judgment of conviction	37
Second Circuit Rule	43
Conclusion	53

TABLE OF CASES.

	Page
Brewer v. Williams, U. S. , 20 CRL 3101,	
3122 (3/23/77)	27, 28, 48, 49
Erubaker v. Dickson, 310 F. 2d 30, 37 . . .	22, 27
Commonwealth v. Hillman, 351 A. 2d 227	
(Pa. 1976)	24
Commonwealth v. Russell, 406 Pa. 45, 176 A.	
2d 641 (1962)	42
Craig v. United States, 217 F. 2d 355 (6th	
Cir. 1954)	40
Faretta v. California, 422 U. S. 806 . . .	23
Ford v. United States, 379 F. 2d 123 (D. C. Cir.	
1967)	41
Gideon v. Wainwright, 327 U. S. 335 . . .	23
Glasser v. United States, 315 U. S. 60, 76	
(1942)	20, 22, 38, 39, 40, 41, 42, 43, 44, 49
Jackson v. United States, 296 F. 2d 135, 198	
(D. C. Cir. 1961, Berger, J.)	25
Johnson v. Zerbst, 304 U. S. 458, 464 (1938) .	27, 49
Morgan v. United States, 396 F. 2d 110 (2d Cir.	
1968)	41, 43
People v. Byrne, 17 N. Y. 2d 209, 270	
N. Y. S. 2d 193	23
People v. Tomaselli, 7 N. Y. 2d 350, 353 . . .	23

	Page
Schneckloth v. Bustamonte, 412 U. S. 212,	
238, n. 25 (1973)	27
Scott v. District of Columbia, 99 A. 2d 641	
(Munic. Ct. App. D. C. 1953), aff'd 214	
F. 2d 860 (D. C. Cir. 1954)	40
Taylor v. United States, 226 F. 2d 337 (D. C.	
Cir. 1955)	40
Tucker v. United States, 235 F. 2d 238 (9th	
Cir. 1956)	40
United States v. Alu, 346 F. 2d 29, 33-34 (2d	
Cir. 1957)	25, 26
United States v. Bernstein, Nos. 74-2328-29,	
74-2462-64 at 6649-51 (2d Cir., March 4,	
1976)	51
United States v. DeBerry, 487 F. 2d 448 (2d	
Cir. 1973)	43, 46, 51, 52
United States v. Foster, 469 F. 2d 1 (1st Cir.	
1972)	40, 41, 51
United States v. Garcia, 517 F. 2d 272 (5th	
Cir. 1975)	50
United States v. Handy, 203 F. 2d 407	22
United States ex rel. Hart v. Davenport, 478	
F. 2d 203 (3d Cir. 1973)	40, 42

United States v. Lovano, 420 F. 2d 769 (2d Cir.), cert. denied 397 U. S. 1071 (1970)	40, 43, 45, 52
United States v. Mari, 526 F. 2d 117, 119 (2d Cir. 1975)	41, 43, 45
United States v. Pinc, 452 F. 2d 507 (5th Cir. 1971)	41
United States v. Puco, 436 F. 2d 761, 762 (2d Cir. 1971)	25
United States v. Swinton, 400 F. Supp. 805 (S.D.N.Y.)	24
United States v. Vowter, 500 F. 2d 1210 (2d Cir.) cert. denied 419 U. S. 1069 (1974)	43, 51
United States ex rel. Williamson v. LaVallee, 282 F. Supp. 968 (E.D.N.Y. 1968) . . .	40, 44
United States v. Wilson Torres, 503 F. 2d 1120, 1126 (2d Cir. 1974)	25, 26
Von Moltke v. Gillies, 332 U. S. 708, 723-24 (1948)	49

V.

STATUTES.

	Page
23 C. J. S. Criminal Law §982(8)	22
Rule 11 Fed. R. Crim. Proc.	50
Rule 44 Fed. R. Crim. Proc.	24
28 U. S. C. 1654	24
28 U. S. C. 2255	1, 3, 38

OTHER AUTHORITIES.

ABA Standard Relating to "The Prosecution Function and The Defense Function," §3.5(b)	43
ABA Standard Relating to "The Prosecution Function and The Defense Function," Section Part IV 4.3 (d)	24, 25
Code of Professional Responsibility, Canons 5 and 7	42
Disciplinary Rules, DR 5-101 B-1 through 4	24
Disciplinary Rules, DR 5-102	24
Judd, Conflicts of Interest - A Trial Judge's Notes, 44 Ford. L. Rev. 1097, 1103-04	51
Judd, Conflicts of Interest - A Trial Judge's Notes, 44 Ford. L. Rev. 1097, 1104-05 (1976)	40

Waltz, Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases, 59 Nw. U. L.

Rev. 289, 355 (1964) 40, 41, 42

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

JACK NATHAN,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

-----X

PETITIONER-APPELLANT'S BRIEF.

Petitioner-appellant Jack Nathan has appealed to this Court from an order of the United States District Court for the Southern District of New York rendered the 28th day of December, 1976, per Dudley Bonsal, D.J., denying appellant's motion pursuant to 28 U. S. C. 2255, wherein he had sought to vacate his conviction under Indictment No. 74 Cr. 377, for tax evasion. An evidentiary hearing was held, during which witnesses testified.

HISTORICAL BACKGROUND.

Petitioner had been convicted on October 9, 1975, of four counts of tax evasion, following a trial before Judge Bonsal and a jury.

He was sentenced to concurrent terms of 9 months imprisonment and fines of \$10,000 on each count.

This Court affirmed the judgment of conviction, 536 F. 2d 988, and certiorari was denied by the Supreme Court on November 1, 1976 (45 U.S.L.W. 3323).

During his trial on the tax evasion charges, Nathan was represented by Louis Bender, Esq., whom he had privately retained.

The Court below, in its opinion dated December 28, 1976, declared that a former Judge, Richard L. Baltimore, Esq., also assisted during a portion of the trial.

The Court below, after hearing testimony, filed the aforesaid opinion denying the motion to vacate the judgment of conviction.

Petitioner was represented by Steven Thal, Esq., in the hearing in the Court below.

Nathan Lewin, Esq., of Washington, D. C., represented petitioner in the Supreme Court of the United States.

THE ISSUE PRESENTED.

The primary issue upon which the Court below granted an evidentiary hearing was to determine whether a conflict of interest on the part of petitioner's trial attorney, Louis Bender, Esq., precluded proper representation of the appellant herein on his original trial.

The conflict of interest stemmed from the fact that Mr. Bender also represented one Joseph Katzman, who had been employed by the petitioner as his accountant, and who would have been an essential witness for Nathan. Katzman was under investigation by the Internal Revenue Service at the time of the trial.

The issue is highlighted by the fact that Katzman was not called as a witness at the trial, and neither was the defendant, Nathan (petitioner here), since to do so would have pitted the credibility of two clients of Mr. Bender against each other.

THE PROCEEDINGS BELOW CONSIDERED.

The hearing below consisted of the testimony of several witnesses, including Louis Bender, Jack Nathan, and Richard L. Baltimore.

The moving papers in support of the motion under 28 U. S. C. 2255 precipitated the Trial Court into granting a hearing, which we submit, on its face, indicates the seriousness with which the issue is presented.

Those papers indicated that in mid-1974 Jack Nathan retained Louis Bender as his counsel and averred that Katzman would be a "key witness" in his behalf since he had "first hand knowledge of the wrongdoings of Sanford Katz," a Government witness.

Exhibit "3" annexed to the affidavit of Jack Nathan in support of the motion to vacate the judgment sets forth a colloquy before the Trial Court which patently reveals the conflict of interest under which Mr. Bender labored. It was apparent that Mr. Bender felt a divided loyalty since he stated, *inter alia*:

"Now, if Mr. Katzman testifies as a witness obviously, I can't disclose any confidential communication given to me by Mr. Katzman, but at the same time Mr. Nathan is entitled to my complete loyalty and I am placed in a position where he could very well feel that [by] my representing Katzman in a different case, he is getting divided loyalty so to speak."

Bearing in mind that Mr. Nathan was represented by Mr. Bender, the record of the trial discloses in the same Exhibit, that petitioner allegedly "waived" any objection to Mr. Bender continuing to represent him. He did not have the independent advice of an attorney who was not directly or indirectly involved in the conflict of interest.

Judge Baltimore was not participating as co-counsel and was not even at the trial the entire period of time, being present only 40% of the time.

In addition to the foregoing, Mr. Nathan took a *polygraph test* which revealed that he had "no knowledge of wrongdoing" by his accountant - Sanford Katz - who admitted at the trial that he had been exclusively responsible for preparing Mr. Nathan's books and tax returns. Katz testified as a Government witness.

Throughout the proceedings, Nathan consistently protested his innocence.

Steven Thal, Esq., in his moving affidavit in support of the motion below, stated, *inter alia*, that he was struck by the fact that there was an absence of any witnesses, including the defendant himself, on behalf of the defense at trial:

"Based upon certain inquiries made by Mr. Lewin and myself, it seemed clear that there was a very substantial defense case which had simply never been presented to the jury. In depth interviews with Mr. Nathan and other participants at the trial made it clear that witnesses who were ready and able to testify (and who could have contributed a great deal to the defense) were never called. Our view of the importance of presenting a defense case was buttressed by our evaluation that the prosecution's evidence had been weak and that there had

been large gaps in the Government's case which were never exploited.

"10. Certainly, the failure to summon witnesses, as a simple function of trial strategy can rarely, if ever, be questioned at this stage of the proceedings. We do not purport to do so here. However, what our investigation has demonstrated is the very startling revelation that the failure to present a defense has been elevated from the level of a strategy disagreement to one involving a possible miscarriage of justice of constitutional dimensions."*

Thal further averred that the defense counsel at trial had a conflict of interest which completely immobilized him. Thus, in paragraph "11" of his moving affidavit, he declares:

"11. Defense counsel at trial had a conflict of interest between two clients which completely immobilized him (perhaps without his knowledge) when it came to presenting a defense case. The attorney - Louis Bender, Esq. - represented Mr. Nathan in the instant case and one of Mr. Nathan's accountants (Joseph Katzman) in another criminal investigation by the I.R.S.

The complexity of the inter-relationship between

* Mr. Bender did not use the Groppe tape nor did he question Groppe on the stand, especially since the jury specifically asked about the Groppe statement during deliberations.

these two clients and their two separate cases may have escaped Mr. Bender but it nevertheless must have had a very substantial impact on the decisions he made during the course of Mr. Nathan's trial as well as in pre-trial preparation."

We submit that this Court ought to consider the five violations of conflict of interest in the following strategic areas set forth in paragraph "12" of the moving affidavit:

"12. What may have misled Mr. Bender and the Court (as it certainly misled Mr. Nathan and subsequent counsel who reviewed the record) was that while the problem hardly surfaced at the trial, its influence was all pervasive. Specifically, the conflict of interest affected FIVE strategic areas:

"1. the possibility of Mr. Katzman's testifying as a Government witness, subject to cross-examination by Mr. Bender;

"2. the possibility of Mr. Katzman testifying as a defense witness;

"3. the possibility of defendant taking the stand and incriminating Mr. Katzman during his testimony;

"4. the possibility of Mr. Bender effectively cross-examining Mr. Katz who may have testified unfavorably against Mr. Katzman's activities;

"5. the possibility of additional defense witnesses taking the stand who may also have testified unfavorably against Mr. Katzman's activities;"

6. [We would add another category of conflict with which we deal, *infra*, more extensively; namely, the ethical conflict against calling as a witness a person only the trial attorney can impeach because that attorney alone could determine if the witness was prevaricating.]

We are, of course, reproducing as part of the appendix, the moving papers and, consequently, it is not necessary to specifically advert to all of the contents thereof.

It is significant that Mr. Katzman was one of the accountants for the petitioner-appellant herein. It is even more pertinent to note that when the Intelligence Division of the I.R.S. became involved in the Nathan investigation, Katzman indicated his desire to withdraw as Nathan's accountant because he, himself, unbeknown to Nathan, was already involved in a separate I.R.S. criminal investigation. Katzman had retained Louis Bender in

connection therewith, which fact was not disclosed to Nathan until the very eve of trial (i.e. the day before), and was not transmitted to the Court until the first day of actual trial.

The hearing in the Court below in the instant proceeding developed the following facts, which we do not think can seriously be contested by the Government:

1. Mr. Bender represented Mr. Katzman before, during, and after Mr. Nathan's trial;
2. Mr. Bender had conflicting statements from each client as to the nature of and responsibility for the Subchapter S matter. In fact, each accused the other of initiating and suggesting the backdating of corporate documents;
3. Mr. Bender felt that the Subchapter S matter was likely to come up at trial if either of his two clients testified; avoiding the airing of the Subchapter S matter bulked large in Mr. Bender's calculations as to whether or not to put Mr. Nathan or Mr. Katzman on the stand; and
4. Had Mr. Nathan testified as to the Subchapter S matter, his version might have hurt Mr. Katzman in his proceeding before the I.R.S. Had Mr. Katzman testified in rebuttal, his version of the Subchapter S matter might have been damaging to Mr. Nathan.

It is obvious from the foregoing that Mr. Bender had two clients who were relating a diametrically opposed recollection of events on a matter likely to be adduced at the trial of Nathan, if either Katzman or Nathan testified. Each, that is Nathan and Katzman, would most likely cast the mantle of blame upon the other, together with the stigma of fraudulent motive or intent.

The hearing itself revealed that Nathan retained Bender in the spring of 1974 (2).*

Katzman retained Bender in connection with his I.R.S. proceeding, in October of 1974 (2, 5).

Bender further declared that prior to trial he had learned that his client, Joseph Katzman, if called as a witness in the Nathan case, would contradict statements made by petitioner (18):

"Q. Is there any particular part of that affidavit that gave you the most concern in making your evaluation or determination that Mr. Katzman might be a damaging witness?

"A. Yes.

"Q. Could you tell us what that was?

* Numerals in parentheses refer to pages of the official court reporter's minutes of the hearing before Judge Dudley Bonsal held on December 1, 1976, unless otherwise indicated.

"A. In particular the statement he made to the Internal Revenue Service on the third page of this copy you showed me which deals with the amended and delinquent returns that were filed during the course of the special agent's investigation wherein the amended and corporate returns were changed from a Sub Chapter S status which was an 1120S to an 1120 which is a standard corporation income tax return and the reasons why that was done" (24).

Mr. Nathan subsequently (26) gave his attorney a different statement of the Subchapter S incident. The conflict between the two men was, in its essence, a dispute over whose idea it had been to backdate corporate documents of Mr. Nathan's firm:

"Q. Is it a fact, Mr. Bender, that Mr. Katzman put the blame on Mr. Nathan for conceiving of the idea of backdating the corporate documents?

"A. In substance, yes. I mean if they were. He didn't know.

"Q. If they were. And Mr. Nathan on the other hand in substance put the blame on

Mr. Katzman for conceiving of the idea of back-dating the corporate documents?

"A. That is correct" (28).

Mr. Bender made plain his belief that the Subchapter S disagreement might well come out at trial if Mr. Nathan or Mr. Katzman were called.* Mr. Bender explained that to the Court in connection with his reasons for not calling Mr. Katzman for the defense:

"THE WITNESS: Yes, your Honor. Mr. Katzman's statement to the Internal Revenue Service brought into focus a collateral issue in this case relating to the motive for which there was a change in the type of tax return that was filed.

"THE COURT: You mentioned that. You mean the S?

"THE WITNESS: Yes, and since that involved a motive attributed by Mr. Katz** to Mr. Nathan which could have imputed a fraudulent intent to him on a matter which was collateral to the issue before this court, I felt that for

* This belief seems justified in view of Fed. Rule Evid. 404(b) and the liberal admissibility policy prevalent in this Circuit. See, e.g., *United States v. Santiago*, 528 F. 2d 1130, 1134-1135 (2d Cir.), cert. denied, U. S. , 96 S. Ct. 2169 (1976).

** So in original - should read Katzman.

Mr. Nathan's interests that I should do everything I could to exclude it.

"THE COURT: All right.

"THE WITNESS: Particularly since the government, the United States Attorney's office, had brought that matter up to me on several occasions and I had been alerted to it by them" (26).

On cross-examination, Mr. Bender emphasized the importance of this matter in his decision not to call the defendant:

"Q. In all of these discussions were there any other considerations that you discussed leading to the conclusion that Mr. Nathan should not testify, other than Mr. Nathan's demeanor of expected poor demeanor as a witness?

"A. Yes.

"Q. What were those?

"A. In connection with the 1120S change over to the 1120, which discussed this with Mr. Nathan, Mr. Nathan produced at my request the corporate minutes of his corporation plus the stock book. Mr. Nathan told me that Mr. Katzman advised him that in order to get a tax advantage in filing the amended returns and the

delinquent returns from an 1120S to 1120, something to the effect that the 1120 would tax the outstanding checks by some maximum 48 and a half percent, whereas the subchapter S might be slightly higher.

"He said that Mr. Nathan, that in order to do that, there would have to be a change of ownership on the 1120S, which would prevent Mr. Nathan from filing an 1120S, that Mr. Nathan then at Mr. Katzman's suggestion went to his corporate books, had his lawyer, who was then deceased, draft corporate minutes reflecting the issuance of stock to his wife, and back-dating the minutes, issuing a stock certificate for the amount of stock to his wife, and back-dating that, and that that eliminated the chance of the eligibility for an 1120S and filing an 1120.

"When Mr. Nathan admitted that to me I asked him under those circumstances does he feel that he can take the stand in this case if asked about the reasons why the 1120S were not used but the 1120 and answer truthfully, and if he did, what this would do to his case which involved an issue totally unrelated to the

1120S and 1120, and that to me was what was most important in my mind that might come out on cross examination of Mr. Nathan had he taken the stand" (46).

Bender testified further that he believed that any testimony by Nathan, at the latter's own trial, might very well hurt Katzman in Katzman's own I.R.S. problem, if Nathan testified to any impropriety on the part of Katzman (60).

Bender had serious reservations about representing both Katzman and Nathan and, apparently, asked Katzman whether or not he objected to Bender's continued representation of Nathan under the circumstances, to which Katzman replied in the negative (31, 32).*

The hearing also clearly divulged that petitioner herein had always wanted to take the stand in his own defense at the trial. He had never been convicted of any crime and was an articulate individual who made a good appearance.

The conflict of interest, however, under which Nathan's trial lawyer, Bender, labored, virtually precluded any possibility that Louis Bender would call petitioner to the witness stand (65-67, 89-90, 5, 119).

* It does not appear that he ever asked Nathan about representing Katzman.

As a matter of fact, Judge Baltimore testified that virtually every time he spoke to Nathan, petitioner said that he "wanted to testify in his own defense" (126).

Nathan, at the hearing below, explained in his testimony (67, 68):

"Q. Now, did you ever talk to Mr. Bender about the subject of whether or not you should testify?

"A. I did.

"Q. Who made the decision, Mr. Nathan, as to whether or not you would testify as a witness in your own defense?

"A. I kept screaming I wanted to testify, but Mr. Bender kept threatening me and putting me down" (89).

"Q. My question is did there come a time when you changed your mind about testifying, and you yourself concluded that you should not testify in your own defense?

"A. No, sir.

"Q. Did you ever tell Mr. Bender at any time that you agreed with his judgment that you should not testify?

"A. No, sir.

"Q. Did you receive advice from anyone else other than Mr. Bender on the question of whether you should testify?

"A. No, sir.

"Q. Did you receive any advice from Judge Baltimore on that subject?

"A. No, sir" (90-91).

"Q. And it is your testimony then that Mr. Bender never said to you that you were the one who had to make the decision as to whether or not you were going to testify?

"A. Absolutely not. If he would have said that, I would have been on the stand. I do not run away from everything" (92).*

It should also be noted that Nathan's voluntary appearance before the grand jury and at the U. S. Attorney's office, tend to strongly support his statement that he wanted to take the stand and, indeed, would have done so, had Katzman not also been represented by Louis Bender, Esq.

In a letter dated December 30, 1975, by Louis Bender to Jack Nathan, it is obvious that Bender was aware of the fact that Nathan wanted to testify.

* Mr. Nathan also testified that Mr. Bender warned him of dire consequences should he insist on taking the witness stand (p. 65, l. 23 - p. 66, l. 10).

It is also obvious, from the historical facts, that Nathan voluntarily appeared before the grand jury and the U. S. Attorney's office (92, 93).

Nathan described Katzman as his "main witness" (64).

Even Louis Bender was obviously aware of the importance of Katzman. And although Mr. Bender had no recollection that Mr. Nathan ever told him that he wanted Mr. Katzman called as a witness (6-7), he testified as follows:

"MR. THAL: No. I am asking did Mr. Bender ever advise Mr. Nathan that Mr. Bender expected to call Mr. Katzman as a witness at the trial?

"THE COURT: Not in those words, Mr. Thal.

"Q. Could you tell me what it was that you may have said in your own words?

"A. I believe when Mr. Nathan disclosed to me his relationship with Mr. Katzman with respect to the transactions involved in the case, I told him that on the basis of what Mr. Nathan said, that Mr. Katzman might make a very good witness for him" (8-9).

And although Mr. Bender subsequently changed his mind, he apparently never advised Mr. Nathan against calling Mr. Katzman as a defense witness:

"Q. And you had a number of discussions. Did you have more than one discussion with Mr. Bender regarding Mr. Katzman as a witness?

"A. I did.

"Q. Can you estimate approximately how many discussions there might have been?

"A. Yes. At different times I had spoken to Mr. Bender whether he had interviewed Joseph Katzman, and he told me he did, and he would be a very good witness.

"Q. Did Mr. Bender ever advise you against calling Mr. Katzman as a witness?

"A. No, sir" (64-65).

The testimony of Sanford Katz at the trial tended to place responsibility with Mr. Katzman for certain accounting practices with respect to returning certain unnegotiated checks to income. (See petitioner's moving affidavit, ¶31.)

Katzman, on the other hand, placed the blame for many irregularities in Nathan's accounts upon Mr. Katz (*Id.*).

This dispute between Katzman and Katz (the accountants), therefore, tended to exculpate Nathan. But Mr. Bender owed a duty to Mr. Katzman not to emphasize the

questionable nature of the latter's activities, and this duty raises serious doubts as to the effectiveness of Mr. Bender's cross-examination of Sanford Katz.

The petitioner herein wanted Theodore Mate to testify as to Sanford Katz's accounting practices (89), and to corroborate Katz's view of Katzman's role. Mr. Bender confirmed that Mr. Nathan asked him if he would call Ted Mate (17). Judge Baltimore testified unequivocally that Mr. Nathan told him he wanted Mr. Mate called (119). Mr. Mate, of course, was not called.

In fact, no defense at all was put in. It is not enough to say that this decision would have been the same had Mr. Bender not represented Mr. Katzman. He did represent Mr. Katzman. Mr. Katzman and Mr. Nathan clashed on a matter that might have come out at trial. And Mr. Katzman might have been hurt in his own I.R.S. matter if the dispute had come out. On the very eve of trial, Mr. Bender told Mr. Nathan and Judge Baltimore he wasn't sure there was a conflict at all (41). Now the conflict is clear, and it cannot be doubted on this record that, in consequence, Mr. Bender's representation of Mr. Nathan "was not as effective as it might have been." Glasser v. United States, 315 U. S. 60, 76 (1942).

The testimony of Richard Baltimore corroborates Nathan's declarations that he wanted to take the stand

and that he wanted Katzman as a witness. Baltimore actually made no trial decisions because he was not representing petitioner as counsel, but, rather, was present as a friend. It is also obvious that he was not at the trial at all times, but only at 40% of it.

POINT I.

PETITIONER'S TRIAL COUNSEL, LOUIS BENDER, WAS INVOLVED IN A CONFLICT OF INTEREST BETWEEN NATHAN AND NATHAN'S FORMER ACCOUNTANT, KATZMAN, BOTH OF WHOM HE REPRESENTED. UNDER THE CIRCUMSTANCES, BENDER SHOULD HAVE DISQUALIFIED HIMSELF FROM REPRESENTING PETITIONER AT HIS TRIAL.

- A. The fact of this conflict was not divulged to Nathan until the very eve of trial, and not to the Court until the first day of trial.**

The petitioner-appellant herein had never been previously convicted of a crime and, consequently, one experienced in criminal matters would certainly expect that such a man would most certainly testify in his own behalf.

This conclusion is reinforced by the fact that Nathan testified voluntarily before the grand jury and also appeared at the United States Attorney's office to discuss the case prior to trial (92, 93).

Louis Bender, on the other hand, undertook to represent Joseph Katzman, petitioner's former accountant, at a point in time when he knew he already represented Nathan and that Katzman might well have to be a witness in the Nathan case.

* A tape recording exists supporting the claim that Bender did not tell Nathan until the eve of trial.

Since the allegations in the indictment against Nathan stem from certain accounting practices, it is patent that Nathan would necessarily want to have the benefit of the testimony of his accountant to explain these things.

Sanford Katz, as we explained, *supra*, testified for the Government, that Katzman was intimately involved in the preparation and maintenance of Nathan's accounting procedures. Although Bender had originally indicated that Nathan should call Katzman as a witness because he would be a "very good witness," that evaluation changed after Katzman retained Bender as his lawyer.*

The fact that Bender enjoys a reputation as a good attorney, is irrelevant to the present problem.

In *Brubaker v. Dickson*, 310 F. 2d 30, 37, the Court aptly noted:

"Due process does not require 'errorless counsel * * * but counsel reasonably likely to render *and rendering* reasonably effective assistance.'" (Emphasis ours.)

Cf. United States v. Handy, 203 F. 2d 407; 23

C. J. S. Criminal Law § 982(8).

It is the duty of the trial Judge to protect this basic right (*Glasser v. United States*, 315 U. S. 60). The right to counsel for one charged with a serious crime

* It is therefore incredible that Katzman was not called. The reason is obvious, however.

means something more than mere companionship during trial and certainly does not contemplate representation by an attorney who has become involved in a conflict of interest to the best interests of his client, so that a crucial witness is eliminated (see, *Gideon v. Wainwright*, 327 U. S. 335).

The highest Court of New York proclaimed in *People v. Byrne*, 17 N. Y. 2d 209, 270 N. Y. S. 2d 193:

"The right to have the assistance of counsel was held to be too fundamental to made to depend upon nice calculations by courts of the degree of prejudice arising from the denial."

In *People v. Tomaselli*, 7 N. Y. 2d 350, 353, the Court held that counsel must be functioning adequately to protect and assist the accused, otherwise he has no counsel at all.

The Sixth Amendment requires that the right to effective counsel be protected and preserved. Nothing in *Faretta v. California*, 422 U. S. 806, is to the contrary.

Bender had interviewed Katzman and unquestionably was the recipient of information which convinced him that it would be a conflict of interest to call Katzman as a witness. He was also obviously convinced that it would

be a mistake to let Nathan testify, because that could possibly hurt Katzman in the latter's own problems with the I.R.S.

To the extent that a judgment had to be made whether to continue the case with Mr. Bender or to request a mistrial, Nathan was his own lawyer and had no assistance of effective counsel (cf: Rule 44 Fed. R. Crim. Proc.).

The Court allowed a "hybrid" type of representation which is not sanctioned by 28 U. S. C. 1654 " * * * parties may * * * conduct their own cases personally or by counsel * * *" (*United States v. Swinton*, 400 F. Supp. 805 [S.D.N.Y.]).

Nowhere is there any waiver by appellant of his desire to or right of effective assistance of counsel.

The failure to impeach credibility could be decisive in a case such as this and certainly warrants reversal because of the inability to be able to call Miss Santangelo (see *Commonwealth v. Hillman*, 351 A. 2d 227 [Pa. 1976]).

That there was a conflict of interest is patent.

See, Disciplinary Rules, DR 5-102 and DR 5-101 B-1 through 4; ABA Standard Relating to "The Prosecution Function and the Defense Function," Section Part IV 4.3 (d).

This Court similarly condemned such conflicts of interest in *United States v. Alu*, 346 F. 2d 29, 33-34 (2d Cir. 1957).

Accord, *United States v. Wilson Torres*, 503 F. 2d 1120, 1126 (2d Cir. 1974). See, *United States v. Puco*, 436 F. 2d 761, 762 (2d Cir. 1971), and *Jackson v. United States*, 296 F. 2d 195, 198 (D. C. Cir. 1961, Berger, J.).

We submit that Mr. Bender should have immediately disqualified himself after the Court's ruling on conflict, and the trial court should not have permitted the continuation of the trial without a thorough allocution of Nathan who in this respect was representing himself.

This Disciplinary Rule is not a broad ethical canon but a specific stricture aimed at preventing the type of conduct engaged in here. Proper practice as to the interviewing of, and relations with, prospective witnesses is covered in the ABA "Standards Relating To The Prosecution Function and the Defense Function." Section Part IV, "Investigation and Preparation."

Section 4.3(d) which provides as follows:

"4.3 Relations with prospective witnesses.

* * *

"(d) Unless the lawyer for the accused is prepared to forego impeachment of a witness by the lawyer's own testimony as to what the witness stated in an interview or to seek leave

to withdraw from the case in order to present his impeaching testimony, the lawyer should avoid interviewing a prospective witness except in the presence of a third person."

This Court said:

"We believe that this prohibition is applicable to the United States Government and its attorneys as well as to private litigants and their attorneys. It is obvious that the opportunity for tailoring a witness's testimony to the needs of the Government's case is maximized if recourse is permitted to the testimony of an experienced trial attorney who is interested in the successful presentation of that case. Especially in criminal litigation, where so much is at stake for the defendant, must the Bench and Bar demand adherence to a principle that is designed to ensure objectivity in the presentation of evidence." *United States v. Alu*, 246 F. 2d 29, 33-34 (2d Cir. 1957).

Accord *United States v. Wilson Torres*, 503 F. 2d 1120, 1126 (2d Cir. 1974).

POINT II.

THERE WAS NO EFFECTIVE WAIVER OF THE CONFLICT OF INTEREST BY PETITIONER. CERTAINLY RICHARD BALTIMORE DID NOT ADVISE OR PARTICIPATE IN THE DETERMINATION TO WAIVE ANY CONFLICT OF INTEREST.

As we have already pointed out in Point I, *supra*, the Court conducted only a limited allocution of Nathan to determine what he wished to do with respect to the obvious conflict of interest involving his trial lawyer, Louis Bender.

Richard Baltimore testified that all important decisions were made by Mr. Bender (121). Baltimore attended as a friend of Nathan's, was present only 40% of the time, and took no part whatsoever in the formulation of defense strategy (43, 62, 94, 110, 118).

In the determination as to whether or not Mr. Bender should disqualify himself or whether he should substitute counsel, Nathan was relegated to depending upon the attorney who actually had the conflict.

It is essential that counsel not only be competent, but that he must be functioning in that manner, and must be "rendering" effective assistance (*Brubaker v. Dickson, supra*, and cases collected under Point I).

A "waiver" is the intentional relinquishment of a known right or privilege (*Johnson v. Zerbst*, 304 U. S. 458, 464 (1938); *Schneekloth v. Bustamonte*, 412 U. S. 212, 238 n. 25 (1973); *Brewer v. Williams*, U. S. , 20 CRL 3101, 3122 (3/23/77)).

In *Brewer v. Williams, supra*, Mr. Justice Stewart explained:

"the question whether a person has acted 'voluntarily' is quite distinct from the question whether he has a trial right. The former question, as made clear in *Brady v. United States*, 307 U. S. at 749, can be answered only by examining all the relevant circumstances to determine if he has been coerced. The latter question turns on the extent of his knowledge."

It was also essential, therefore, that Nathan have independent advice from a lawyer not involved in the conflict at all who could advise him what to do under these unusual circumstances. Nathan did not comprehend his rights.

We have already indicated that Judge Baltimore was not functioning in that context. As a matter of fact, Judge Baltimore testified at the hearing that he never learned from Mr. Bender that he was representing Mr. Katzman in a criminal case (118).

Additionally, Judge Baltimore asserted that on numerous occasions Nathan told him that he wanted to take the witness stand in his own defense (118, 119).

We must bear in mind that no witnesses were called in Nathan's defense, not even character witnesses.

The moving papers in the Court below, upon the motion to set aside the judgment, revealed that counsel who analyzed the trial brought to the attention of Judge Bonsal the fact that there were important aspects of the defense case which were never brought out and which were never probed by Mr. Bender.

Even under these extreme handicaps, the case was a very close one and the jury convicted on only four counts, and then only after substantial deliberation.

Had there been testimony by Katzman and by Nathan and by Mate, or any one of them, that might well have tipped the balance.

Nathan was not even fully aware of the nature of the true conflict and if he was not aware of it, obviously the Trial Judge could not have been fully apprised of what was involved. Moreover, it now appears beyond dispute that both Mr. Nathan and Judge Baltimore were equally in the dark on the conflict issue. Mr. Bender testified he did tell Mr. Nathan about any possible conflict until "shortly prior" (17), perhaps less than a week prior (18), to the start of trial.

"A. I told Mr. Nathan that I represented Mr. Katzman in a totally unrelated *matter involving a client of Mr. Katzman's* that I had not until this time put together the two people, that is to say that this was the same Katzman that I had been involved in representing Mr. Nathan during the Internal Revenue investigation, that I felt that because of that fact it might be difficult in the event Mr. Katzman is called as a witness, which I had understood Mr. Katzman was going to be for the government -- in view of that relationship and that he ought to consider other counsel in connection with that, and that I think in substance that was it " (38). (Emphasis added.)

Even as Mr. Bender restates it, the explanation is still vague and seems to emphasize the involvement of Mr. Katzman's client, not Mr. Katzman. Nor, of course, was there any indication that an I.R.S. investigation of Mr. Katzman was at issue. The effect is to downplay the conflict; indeed, Mr. Bender also told Mr. Nathan that he "wasn't sure" that it was in fact a conflict (41).

Neither was Mr. Nathan. He testified he first learned of the problem on the first day of trial and that he then

thought it involved a client of Mr. Katzman's (68-70, p. 95). Neither at this meeting nor subsequently did Mr. Bender explain to Mr. Nathan the gist of the conflict:

"Q. Were you ever advised by Mr. Bender that your testimony might contradict or conflict with any testimony that might have been given by Mr. Joseph Katzman?

"A. No, sir" (71).*

Judge Baltimore stated that he first learned of the possible conflict the night before the trial (111). He too thought the problem involved a client of Mr. Katzman's, not Mr. Katzman himself (112).

On cross-examination, Mr. Nathan was asked about the conference on this subject at trial:

"Q. You were present in court?

"A. Yes.

* Mr. Nathan also testified that, after learning of the conflict:

"I said, 'Well, Mr. Bender, what should I do now? What do you suggest? Do you know of anybody, another attorney that you could recommend?', and he said 'No,' and he said 'Besides that,' he said -- I said, 'How will that affect Judge Bonsal?', and he said, 'He won't like it. He will look very unkind against something like this if this is brought up,' and he said, 'He won't be very favorable,' and then, of course, he was asked to give me a refund, and then Mr. Bender hemmed and hawed and said it really had nothing to do with it. He said this will be all right, and at that time, as you know, I had an eye operation, and I didn't feel good, and I went along with it to get it over with" (70-71).

"Q. When this matter was discussed with Judge Bonsal in the robing room at the trial. Is that right?

"A. That is right.

"Q. At that time did you understand what Mr. Bender was saying?

"A. Partially. Partially.

"Q. You did not really understand it. Is that your testimony?

"A. I did not understand the whole thing. No, sir, I did not. I was still of the opinion that Mr. Katzman was not involved especially with the I.R.S., and that he had involved another client with difficulties like I'm involved, and I am involved now.

"Q. Well, were you asked this question, and did you give this answer:

"THE COURT: I can understand that too, but the point is totally apart from your reliance on Mr. Bender, and Mr. Baltimore, I want to ask you do you understand the situation.

"THE DEFENDANT: -- That is you, Mr. Nathan -- 'I do.'"

"A. That is right.

"Q. Now, was that a true answer or not?

"A. It was an answer based on the fact that Mr. Katzman was not involved in any situation, and I answered that because I asked Mr. Bender himself, 'Well, what should I do now?'" (96-98).

"Q. Now, at the time of that conference, did you understand Mr. Bender to be saying he was the attorney for Mr. Katzman in another situation?

"A. No, sir" (98).

"Q. Let me ask you this, Mr. Nathan: At the end of that conference before Judge Bonsal, did you understand at that point that Mr. Nathan -- well, excuse me -- that Mr. Bender was saying that he was the attorney for Mr. Katzman in another unrelated situation?

"A. No, sir" (100).

Mr. Nathan's incorrect understanding was apparently shared by Judge Baltimore. He testified that at the conference with Judge Bonsal he still was under the impression that the conflict involved a client of Mr. Katzman's.

THE WITNESS: In that conference Mr. Bender made a passing reference that Mr. Katzman was a client of his, but I did not understand that

Mr. Bender was representing Mr. Katzman in any matter which involved Mr. Katzman in an Internal Revenue Service matter or criminal investigation. *I still thought that Mr. Katzman had a client who was involved with the government* (117). (Emphasis added.)

Adding to the difficulty was the fact that Mr. Bender's explanation to Judge Bonsal was "materially different" from what he had told Judge Baltimore the day before:

"Q. Judge Baltimore, at the time of the conference with Judge Bonsal on the conflict of interest question, did you think that what Mr. Bender told Judge Bonsal about this potential conflict of interest was materially different from what he had told you in his office the day before?

"A. Yes, there was a difference, definitely was.

"Q. You realized it at that time?

"A. I did."

On redirect:

"Q. Did you understand during the conference before Judge Bonsal that more than just

the cross examination of Joseph Katzman was at issue?

"A. That was the only thing I was concerned with at the time.

"Q. Did you understand that the conflict of interest that Mr. Bender was raising before Judge Bonsal might affect other decisions that were being made at the trial or would be made at the trial?

"A. I had my own opinion. There was no discussion of it.

"Q. What was your opinion?

"A. The instant I found out that Bender represented Katzman, then the conflict of interest was in my mind, and if Katzman took the stand, I intended to bring out to the jury that Katzman could not properly represent Mr. Nathan in his negotiations with the Internal Revenue Service if he was under any cloud, but I did not know that before these discussions, that Katzman was the client Mr. Bender spoke of.

"Q. Did you understand that Bender's concern with Katzman being called as a witness had anything to do with whether or not Mr. Nathan took the stand?

"A. That just never came up."

It emerges from the above (1) that Mr. Nathan* did not understand the nature of the problem; (2) that Judge Baltimore thought he understood, only to hear Mr. Bender tell the Court a materially different version; (3) that Judge Baltimore thereupon had in mind only the cross-examination problem; and (4) that the specific conflict outline above was never apprehended by any of the participants in the conference. Indeed, *we know from the trial record that the Court was not apprised of any problems except the cross-examination difficulty.* Under these circumstances, it was impossible for the Court to initiate the kind of thorough inquiry necessary to substantiate the waiver of Sixth Amendment rights. For the same reason, *Mr. Nathan's "waiver" was neither knowing, intelligent nor voluntary. As a matter of law and fact, it was no waiver at all.*

In short, neither Nathan, nor Baltimore, nor the Court appreciated the problem in its true import since they were unaware of the full extent of the conflict at that time.

* Recent eye surgery and a recently broken shoulder posed an additional difficulty for Mr. Nathan during trial (76, 120-121).

POINT III.

THE COURT BELOW SHOULD HAVE GRANTED THE MOTION TO VACATE
THE JUDGMENT OF CONVICTION.

From the foregoing, it is obvious that a patent conflict of interest existed involving Louis Bender's representation of Nathan and Nathan's former accountant, Joseph Katzman.

It is manifest that Judge Baltimore, by his own testimony, made no decisions on trial strategy; left all important decisions to Mr. Bender, and appeared only in the capacity as a friend of petitioner at his trial. More significantly, Baltimore was present only 40% of the time.

We recognize that the petitioner was asked by Judge Bonsal whether he wished to continue with Mr. Bender and that he answered in the affirmative. On that occasion, however, he was still being represented by Bender and was acting without the aid of impartial counsel since Bender unquestionably could not render advice on this important issue because of the existing conflict of interest.

To the extent that he made this decision to continue with Bender, petitioner acted as his own lawyer and received no adequate advice of impartial counsel. The Court below did not advise Nathan of his right to consult with a different lawyer to make an intelligent decision.

The whole purpose of Section 2255 of Title 28 of the United States Code is to provide a means to redress such an injustice as occurred herein.

A perusal of the record reveals that there were clearly important defenses which could have been interposed, but were not, during the trial.

It is hard to understand how it is possible that no defense whatsoever was interposed by Louis Bender. The only logical explanation, of course, and the inescapable conclusion, is that Bender was not rendering impartial advice because he was torn between loyalties to two clients.

We must bear in mind that we are not dealing with a case involving joint representation of co-defendants. Rather, we are dealing with a conflict that was obscured from view at the trial stage because the representation of Katzman was the type of prejudice which does not easily become apparent, except upon probing. Once it comes to the surface, however, it is then a much more insidious type of prejudice than that which is openly revealed when jointly-represented defendants are on trial in the same case.

In *Glasser v. United States*, 315 U. S. 60, *supra*, the Supreme Court dealt with the problem of conflict in *extenso*.

Faulting the trial judge for his appointment of counsel in the face of the possible conflict, the Supreme Court then reviewed the substance of Glasser's claims and found ample evidence that his attorney was laboring in a "struggle to serve two masters." 315 U. S. at 75. The Court continued:

To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. [Citations omitted] * * * Our examination of the record leads to the conclusion that Stewart's representation of Glasser was not as effective as it might have been if the appointment had not been made. We hold that the court thereby denied Glasser his right to have the effective assistance of counsel guaranteed by the Sixth Amendment. *Id.* at 75-76.

The principles of *Glasser* have been applied many times since and to many different kinds of conflicts of interest. It has been held irrelevant, for example, whether the

attorney is appointed by the court or is privately retained. *United States ex rel. Hart v. Davenport*, 478 F. 2d 203 (3d Cir. 1973); *United States v. Foster*, 469 F. 2d 1 (1st Cir. 1972); *United States v. Lovano*, 420 F. 2d 769 (2d Cir.), cert. denied 397 U. S. 1071 (1970); *Porter v. United States*, 298 F. 2d 461 (5th Cir. 1962); *Craig v. United States*, 217 F. 2d 355 (6th Cir. 1954); *United States ex rel. Williamson v. LaVallee*, 282 F. Supp. 968 (E.D.N.Y. 1968). See Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 Nw. U. L. Rev. 289, 355 (1964).

The Glasser rationale has been held to apply not merely to the common problem of joint representation of co-defendants, but also the conflict of interest that may arise when an attorney owes a duty to a witness in a criminal proceeding, or to some other third party. *Tucker v. United States*, 235 F. 2d 238 (9th Cir. 1956); *Taylor v. United States*, 226 F. 2d 337 (D. C. Cir. 1955); *United States ex rel. Williamson v. LaVallee*, supra; *Scott v. District of Columbia*, 99 A. 2d 641 (Munic. Ct. App. D. C. 1953), aff'd, 214 F. 2d 860 (D. C. Cir. 1954). See generally, Judd, *Conflicts of Interest - A Trial Judge's Notes*, 44 Ford. L. Rev. 1097, 1104-05 (1976). Moreover,

[u]nder the Glasser rationale it is of no legal significance that the conflict * * * first arose during trial and was not foreseen by the

parties or the trial court; if solitary counsel is hamstrung by a conflict of interests coming to light in mid-trial a requested mistrial or new trial should be granted. Waltz, *Inadequacy of Trial Defense, supra*, 59 Nw. U. L. Rev. at 334-335.

In short, *Glasser* and its progeny have settled beyond peradventure the proposition that, where the defense is hampered by counsel's conflict of interest - to the point, *Glasser* holds, where it "was not as effective as it might have been" - there is a denial of the Sixth Amendment right to the assistance of counsel.*

There is, at least on the surface, less agreement as to the strength of the showing required on review. While there is near unanimity that the mere fact of joint representation of co-defendants is not a violation of the Sixth Amendment (see *United States v. Foster, supra*; *United States v. Pine*, 452 F. 2d 507 [5th Cir. 1971]; *Morgan v. United States*, 396 F. 2d 110 [2d Cir. 1968]. But see *Ford v. United States*, 379 F. 2d 123 [D. C. Cir. 1967]; *United States v. Mari*, 526 F. 2d 117, 119 [2d Cir. 1975] [Oakes, J., concurring]), courts differ, perhaps more in language than in result, as to what additional circumstances must be shown.

* Absent waiver thereof, treated, *supra*, Point II.

Again, the standards seem to have evolved directly out of *Glasser*. There, the Supreme Court's inquiry stopped when the Court had satisfied itself that there was, in fact, a conflict of interest, that defendant's attorney had labored at "cross-purposes" in an attempt to "serve two masters." The Court held that calculation of the amount of prejudice was unnecessary from a constitutional standpoint. The finding that Glasser's lawyer suffered from a conflict of interest was indistinguishable from the finding that his assistance was not as effective as it might have been.

Thus, some authorities have held that the mere possibility of prejudice or of a conflict of interest, however remote, will result in a finding that the representation is constitutionally defective. See, e.g., *United States ex rel. Hart v. Davenport*, *supra*, 478 F. 2d at 210; *Commonwealth v. Russell*, 406 Pa. 45, 176 A. 2d 641 (1962). See Waltz, *Inadequacy of Trial Defense*, *supra*, 59 NW. U. L. Rev. at 334. Such a standard squares with the Code of Professional Responsibility, Canons 5 and 7. See particularly, EC5-15:

"* * * A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in

litigation multiple clients with potentially differing interests. (Emphasis added.)

See also, *ABA Standards Relating to the Prosecution Function and The Defense Function* §3.5(b) (Approved Draft 1971).

Second Circuit Rule

The leading statement of the rule in this Circuit appears in *United States v. Lovano*, 420 F. 2d 769, 773 (2d Cir.), cert. denied, 397 U. S. 1071 (1970):

[S]ome specific instance of prejudice, some real conflict of interest, resulting from a joint representation must be shown to exist before it can be said that an appellant has been denied the effective assistance of counsel.

See also, *United States v. Mari*, 526 F. 2d 117 (2d Cir. 1975); *United States v. Vowter*, 500 F. 2d 1210 (2d Cir.), cert. denied, 419 U. S. 1069 (1974); *United States v. DeBerry*, 487 F. 2d 448 (2d Cir. 1973); *Morgan v. United States*, 396 F. 2d 110 (2d Cir. 1968).

The *Lovano* rule requires either a showing of a "real" conflict of interest, or an instance of prejudice arising from an apparent conflict. This is entirely consistent with *Glasser*, *supra*. The Second Circuit rule does not

require proof of a genuine conflict of interest and prejudice arising therefrom. Clerly, such a reading would defeat the *Glasser* holding that the courts are not to indulge in "nice calculations" of prejudice where Sixth Amendment rights are at stake. This point is persuasively made in *United States ex rel. Williamson v. LaVallee*, *supra*, 282 F. Supp. at 971-974. In *Williamson*, the defendant had been represented by an attorney who also represented an important prosecution witness, then under indictment. The prosecution cited pre-*Lovano* authorities for the proposition that, even if there was a conflict of interest in this situation, the petitioner had failed to show that he was prejudiced and therefore should not prevail. The Court (Zavatt, C.J.) did not agree:

"It is true that LaFreniere [the attorney] made it clear to the court and jury that Cordova [the witness] was an addict, that he had a criminal record, that he was then under indictment and being represented by LaFreniere, and that, therefore, his credibility was suspect. The argument is offered that it is proper in this type of case to search the record in order to discern whether petitioner was prejudiced,

and that such a search here indicates that he was not, since LaFreniere did all that could have been done under the circumstances.

"All the cases cited by the respondent do speak of the presence or absence of indications of prejudice on the record. *However, in each of those cases the court was in fact searching the record in order to determine whether or not there existed a conflict of interest, not whether, given such a conflict, the defendant suffered any prejudice therefrom. (Citations omitted.)*

"In the instant case, there was most certainly a conflict between the interest of petitioner and that of Cordova. In any event, it cannot be said with certainty that petitioner suffered no prejudice. 282 F. Supp. at 972-73."
(Emphasis added.)

See, most recently, *United States v. Mari*, 526 F. 2d 117, 119 (2d Cir. 1975) (defendant must show conflict or prejudice).

Moreover, the *Lovano* rule is not applicable to cases in which the possibility of a conflict has been brought to the attention of the trial court and that court has failed to conduct a thorough inquiry into the circumstances.

The purpose of such an inquiry is to determine whether new counsel ought to be assigned or retained or whether, after the *defendant* has been apprised of *all* the facts, he is willing voluntarily to waive Sixth Amendment rights that have been carefully explained to him. (See Point II, *supra*). As the Court of Appeals pointed out in *United States v. DeBerry*, 487 F. 2d 448, 453-54, n. 6 (2d Cir. 1973):

"We agree with the approach of the First Circuit that the lack of a satisfactory inquiry shifts the burden of proof on the question of prejudice to the Government. *United States v. Foster*, 469 F. 2d 1, (1st Cir. 1972)."

Here, the nature of the conflict, never fully revealed at trial, is manifestly real and genuine. Mr. Nathan's trial counsel, Mr. Bender, had represented a potential Government rebuttal witness, Joseph Katzman, in connection with an "unrelated" I.R.S. investigation. That investigation was later terminated in Mr. Katzman's favor. Katzman was the accountant called in by Mr. Nathan when it appeared that his previous accountant was not properly handling the I.R.S. audit of Nathan.

As Nathan's accountant, Katzman was in a key position to testify favorably for the defense as to a number of matters directly related to the criminal charges (see

Thal Affidavit in Appendix). But Katzman had executed an affidavit for the Government which tended to show wrongdoing on Nathan's part in connection with a Subchapter S filing. Nathan told Mr. Bender a diametrically opposite story which tended to show wrongdoing on Katzman's part. Thus, if either man took the stand, Mr. Bender would face an irresolvable dilemma: his duty to Nathan would mandate searching examination or cross-examination of Katzman; his duty to Katzman would require sidestepping Nathan's damaging testimony against the accountant.

The moving affidavits detail the prejudice, which need not be repeated *in extenso*, as they are in the appendix.

We must bear in mind that the extent of Bender's conflict was never really brought home to the Court or to the petitioner.

It was framed only in the narrowest of terms: *viz.*, that Mr. Bender had represented Katzman in a *totally unrelated* matter and that this would impair his cross-examination of Katzman should Katzman be called by the Government. The trial judge asked Nathan if he understood his Sixth Amendment rights, and Nathan answered that he had complete confidence in his counsel. Mr. Bender suggested that:

we should get from Mr. Nathan an expressed statement, not that he is following Judge Baltimore and me blindly, but that he understands the situation * * * (Exhibit 2, p. 176).

The Court asked Nathan, "do you understand the situation?" Nathan answered, "I do." THE COURT: "Regardless of your reliance on them you do waive any right that you may have, is that correct?" DEFENDANT: "Yes, your Honor." *Id.* at 177. (See *Brewer v. Williams, supra*).

The record is bare of any suggestion that the "situation" was explained to Mr. Nathan. Nor does it appear that he was apprised of the nature of "any right that you may have." Indeed, even if such an explanation had been made and recorded, it could not have exceeded the limited understanding of Bender's conflict of interest evinced by Court and counsel.*

These facts alone suffice to negate any assertion that Nathan waived his Sixth Amendment rights. The absolute limit of his "waiver" could only embrace his *apparent* acquiescence in having the cross-examination, if any, of Katzman conducted by Judge Baltimore. He could not have waived his rights, *inter alia*, to testify

* Since the Court itself was not aware of all of the facts nor the actual conflict of interest there is no implication that the Court could have or should have explored the matter in greater detail with counsel or with Mr. Nathan.

in his own behalf, to call witnesses and to present a defense, and to cross-examine prosecution witnesses vigorously, for the simple reason that *no one then realized these rights were in danger.*

But there is more. Nathan's doubtful physical condition (having just undergone a painful eye operation); his lack of legal expertise; the fact that he first learned of the conflict on the eve of trial; and the fact that he was asked to claim or waive (*en masse*) his Sixth Amendment rights *in the presence of Mr. Bender* (upon whom Nathan had theretofore understandably placed great trust) all militate strongly against so crucial a determination as waiver of fundamental constitutional rights. See *Johnson v. Zerbst*, 304 U. S. 458 (1939); *Brewer v. Williams*, *supra*; *Glasser v. United States*, *supra*; *Von Moltke v. Gillies*, 332 U. S. 708, 723-24 (1948):

[A] judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature

of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.

It should be noted that the case referred to the Court by Mr. Bender during the "waiver" colloquy, namely, *United States v. Garcia*, 517 F. 2d 272 (5th Cir. 1975), held that even where the defendant affirmatively seeks to waive his right to conflict-free representation, the court should undertake a full inquiry into the voluntariness of the waiver similar to the procedure mandated by F. R. Crim. P. 11 regarding guilty pleas:

[T]he district court should address each defendant personally and forthrightly advise him of the potential dangers of representation by counsel with a conflict of interest. The defendant must be at liberty to question the district court as to the nature and consequences of his legal representation. Most significantly, the court should seek to elicit a narrative response from each defendant that he has been advised of his right to effective

representation, that he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict, that he has discussed the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections. 517 F. 2d at 278.

See also *United States v. Foster*, *supra*.

The Second Circuit rule is substantially the same. See *United States v. Vowteras*, 500 F. 2d 1210 (2d Cir.), *cert. denied*, 419 U. S. 1069 (1974); *United States v. DeBerry*, 487 F. 2d 448 (2d Cir. 1973); Cf. *United States v. Bernstein*, Nos. 74-2328-29, 74-2462-64, at 6649-51 (2d Cir., March 4, 1976). In *Vowteras*, a conflict of interest claim was rejected where the trial Court (Judd, J.) had conducted extensive pretrial examination of each defendant, *out of the presence of counsel*, and had interviewed counsel as well, in order to determine that the waiver was a knowing relinquishment of the rights attendant to separate representation. See Judd, *Conflicts of Interest*, *supra*, 44 Ford. L. Rev. at 1103-04. The Second Circuit concluded that the defendants:

cannot now repudiate their choice in the absence of a credible showing of "some specific instance of prejudice, some real

conflict of interest, resulting from a joint representation." 500 F. 2d at 1211 (quoting *United States v. Lovano, supra*, 420 F. 2d at 773.)

Thus, not only is the standard for waiver of the effective assistance of counsel in conflict situations very severe, but even if that standard is met, it remains open to the defendant to show a genuine conflict of interest or specific prejudice under *Lovano*. This suggests that, if the trial court becomes aware of a possible conflict and fails adequately to inquire into the underlying facts and apprise the defendant of his rights in connection with those facts, then the defendant should be held to an even less demanding showing on review than is required by *Lovano*.

This is in fact the holding of *United States v. DeBerry*, 487 F. 2d 448 (2d Cir. 1973). There, as in the instant case, the possibility of conflict arose during trial; there, as here, the inquiry conducted by the trial judge was a perfunctory one. The defendants' counsel assured the court that she had explained all aspects of the conflict to her clients many times. The Court of Appeals held that what was required of the trial Court was a "most careful inquiry" into the circumstances,

including "interrogating the individual defendants, themselves." 487 F. 2d at 453. The Court continued (*Id.* at 453-54, n. 6):

This inquiry by the district judge, however well-intentioned, is not sufficient to establish the absence of prejudice to either of the defendants. *We agree with the approach of the First Circuit that the lack of a satisfactory inquiry shifts the burden of proof on the question of prejudice to the Government.* (Emphasis added.)

CONCLUSION.

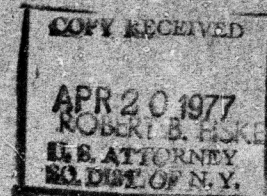
The order denying the motion to vacate the judgment of conviction should be reversed with directions to grant the motion.

Respectfully submitted,

IRVING ANOLIK,
Attorney for Petitioner-
Appellant.

Two 2
Service of ~~three~~ (2) copies of
the within is
hereby admitted this day
of , 197

ROBERT B. FISKE JR.
Attorney for USA



USA